

12
No. 10117.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GUSTAVE L. GOLDSTEIN, as Trustee in Bankruptcy of the
Estate of Marvin Polakof,

Appellant,

vs.

MARVIN POLAKOF and IVAN POLAKOF,

Appellees.

APPELLEES' BRIEF

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APPELLEE'S BRIEF.

Statement of the Case.

Two main issues were formulated by the pleadings and the evidence before the trial court:

I. Who was the actual owner of the real estate involved in this lawsuit—Ivan Polakof or Marvin Polakof?

II. Was the transfer of the property by Marvin Polakof to Ivan Polakof fraudulent?

After a bitterly contested trial, before a capable and conscientious judge, the trial court found:

I. That Ivan Polakof was the actual owner of the real estate. [Finding V, R. 21.]

II. That Marvin Polakof never had any interest or ownership of the real estate. [Finding V, R. 21.]

III. That the transfer of the property by Marvin Polakof to Ivan Polakof was not fraudulent. [Findings VIII and IX, R. 22.]

IV. That Marvin Polakof never represented or held himself out to be the owner of the aforesaid real property. That none of the creditors of Marvin Polakof, extended to the defendant, Marvin Polakof, any credit or delivered any merchandise, services or personal property, relying on the record ownership of the Baldwin Park property by the defendant, Marvin Polakof. [Finding VI, R. 21.]

V. That on or about the 26th day of August, 1937, to and including April 30, 1939, Marvin Polakof, was solvent and that the gross amount of his assets exceeded the gross amount of his liabilities. That on August 26, 1937, to and including April 30, 1939, the defendant, Marvin Polakof, had sufficient funds and/or property other than the Baldwin Park property, sufficient to pay his then creditors any sums of monies due them. [Finding XI, R. 22-23.]

The appellees firmly believe the findings are in accordance with the weight of evidence produced at the trial. Judge Ben Harrison tried this case without a jury; substantially no material evidence was excluded (there is no appeal or discussion of any excluded evidence in the appellant's briefs); the plaintiff's case is tersely as follows: "I think the facts are very weak. The facts preponderantly show that this property belonged to Ivan from the description of the transaction." [R. 225.]

Summary of the Evidence.

The appellant's summary of the evidence, in the opinion of the appellees, is not correct. What appellant attempted to do in his summary of the evidence was to quote principally from the appellant's evidence, in order to overcome the presumption that the judgment is supported by the evidence and the findings of fact. (See pages 9 to 16, inclusive, of Appellant's Brief.) In order to meet this abortive attempt, the appellees here give a brief summary of the evidence which supports the findings and the judgment.

The evidence can be briefly summarized as follows:

Ivan Polakof and Marvin Polakof were brothers. Sam Polakof was their father. He died prior to the commencement of this litigation.

Ivan Polakof was originally the owner of the wine business known as the Ace Distributing Co., located at 784-786 Kohler street, Los Angeles, California. In 1935 Ivan Polakof went to work for the Southern California Winery. At that time he turned over to Marvin Polakof, as a gift, the business of the Ace Distributing Co. [R. 208.]

In December, 1935, Ivan Polakof was approached by his father, Sam Polakof, and a Mr. A. Fratkin to purchase the real estate (the subject of this litigation), which is referred to in the pleadings and evidence as the Baldwin Park property. This property was to be bought as a speculation to be resold for a profit in a short time. [R. 183-184.] Ivan Polakof was scheduled to go to school in Missouri. Inasmuch as Ivan Polakof would not be available to sign and negotiate a quick resale of the Baldwin

Park property, Ivan Polakof decided to have the property bought in the name of A. Fratkin and Marvin Polakof. At the sale of this property in a bankruptcy proceeding, the price for which it was sold exceeded the expected sale price. Ivan Polakof for his one-half needed \$1300.00. He had \$800.00 of his own and borrowed \$500.00 to complete the purchase price. Marvin Polakof did not furnish any portion of the purchase price. [R. 168, 186, 187, 188.]

The anticipated quick resale of the Baldwin Park property failed to materialize. Ivan Polakof had gone back east to school. Thereafter, Mr. A. Fratkin wanted to be paid off. Accordingly, in 1937, Ivan Polakof purchased the interest of A. Fratkin. As part of the consideration of the sale to Ivan Polakof of Mr. Fratkin's one-half interest in the Baldwin Park property, Mr. Fratkin was given a trust deed for \$1000.00 secured by the Baldwin Park property. [R. 180.] Ivan Polakof still thought there would be a quick sale. The federal government was contemplating the purchase of this property. At Ivan Polakof's request, and for the above reasons, Mr. A. Fratkin conveyed his one-half interest in the property to Marvin Polakof.

Thereafter, Marvin Polakof became engaged to be married and went to Omaha, Nebraska, to live. In August, 1937, Ivan Polakof was fearful of the complications that might arise through the expected marriage and possible community property rights. On the advice of the appellant's witness, E. K. Albright, Ivan Polakof had a quit claim deed to the Baldwin Park property prepared and mailed to Marvin Polakof. [R. 80, 81, 184.] Marvin Polakof, before he was married on or about August 26, 1937, signed and executed this quitclaim deed transferring

the Baldwin Park property to Ivan Polakof. On or about August 26, 1937, at Omaha, Douglas County, Nebraska, Marvin Polakof had the quitclaim deed to the Baldwin Park property notarized and mailed at once to Ivan Polakof. [R. 6-167.]

On or about June 7, 1939, Ivan Polakof paid off the \$1000.00 due on the aforesaid \$1000.00 trust deed, given to Mr. A. Fratkin in 1937. Ivan Polakof did not have the cash monies then available, so he borrowed the sum of \$1000.00 from the California Bank on Ivan Polakof's property referred to herein as the Riverside Drive property. [R. 180.] Before 1935, Ivan Polakof's grandfather made a gift of the Riverside Drive property to Ivan Polakof, a single man. [R. 180.] The original loan, dated September 5, 1936, by the California Bank on this property was \$3000.00 [R. 180], and was paid down by Ivan Polakof to \$895.37 in May, 1939. [R. 176-180.] On or about May 9, 1939, Ivan Polakof borrowed an additional \$1000.00 from the California Bank, and gave as security the Riverside Drive property. [R. 176-177.] Said Ivan Polakof's note to the California Bank for \$1000.00 and the balance of \$895.37, due to the California Bank in May, 1939, were paid off in an escrow on June 17, 1939, wherein Ivan Polakof sold to William H. Rivkin and Anna Rivkin for the sum of \$4500.00 the Riverside Drive property. [R. 163-164.] Through this escrow on June 17, 1939, the California Bank was paid off the \$1939.33 due, and the balance of the purchase price was paid to Ivan Polakof. [R. 164-165.]

Ivan Polakof received \$909.20 as the proceeds of his \$1000.00 loan made on May 23, 1939, by the California Bank at its main office. [R. 178-179.] On or about June 7, 1939, Ivan Polakof went to the California Bank,

Market & Produce Branch, withdrew \$155.20 from his commercial account. With part of the \$155.20 and with the net proceeds of his \$1000.00 loan from the California Bank, Ivan Polakof purchased a cashier's check Number 11-10025 for \$1039.40, issued by the California Bank in favor of A. Fratkin [R. 159-181-182-183], which cashier's check was endorsed by A. Fratkin and cashed on June 9, 1939. [R. 159-160.] The purchaser of the check was Ivan Polakof. [R. 160.] Marvin Polakof did not pay any part of the monies paid to Mr. A. Fratkin by Ivan Polakof. [R. 168.] Thus, the \$1000.00 deed of trust in Mr. A. Fratkin's favor was paid off on June 9, 1939. [R. 159-160.]

After securing the deed from Marvin Polakof in 1937, on the advice of Mr. E. K. Albright, Polakof did not record the deed until he was ready to get a certificate of title. [R. 184.] Accordingly, having paid off Mr. Fratkin on June 9, 1939, Ivan Polakof secured a reconveyance of the said deed of trust. On or about June 26, 1939, Ivan Polakof requested the Title Insurance & Trust Co. to issue a policy of title insurance. This policy of title insurance, Number 7,630,600, was issued by the Title Insurance & Trust Co. on or about June 26, 1939, showing the Baldwin Park property vested in Ivan Polakof, a single man. [R. 184-185.]

At the time the Baldwin Park property was purchased in 1935 for \$2600.00 at the court sale, Ivan Polakof had \$800.00 cash, and borrowed \$300.00 from his uncle Rudy in order to purchase a one-half interest with Mr. A. Frat-

kin. At the date of the sale, the price was \$400.00 higher than expected, so Ivan Polakof borrowed \$200.00 from his father to complete the purchase price. Marvin Polakof did not loan any monies to Ivan Polakof in order to complete the purchase price. [R. 188.] Ivan Polakof had made considerable monies prior to 1935, to-wit, \$10,000.00 in one winery deal within two years prior to this deal, and paid an income tax on \$8,000.00 [R. 188], and was employed at the Monte Christo Winery in 1935 [R. 188] and has been a wine chemist since then. [R. 188.]

Since the purchase of the Baldwin Park property in 1935, Ivan Polakof exercised exclusive control over the property. [R. 188.] He had paid all the taxes on the property. The first year after the purchase, the Baldwin Park property was leased by the True-X Chemical Company, who paid the taxes [R. 191], and thereafter by Ivan Polakof's checks made payable to the Tax Collector of Los Angeles County. [R. 191.]

Also, Ivan Polakof paid for the water stock appurtenant to the land, to-wit, five shares of Connemara Mutual Water Co, part of which came from the rental paid by the True-X Chemical Co., and the balance of the water stock was paid by Ivan Polakof. [R. 99-192.] This water stock was issued in the name of Ivan Polakof on or about October 11, 1937, some time after Marvin Polakof, on August 26, 1937, had delivered the deed for the Baldwin Park property to Ivan Polakof. [R. 99.] Mr. E. K. Albright, the appellant's witness, testified, the stock was issued in Ivan Polakof's name in 1937 (after

the transfer of the Baldwin Park property by Marvin Polakof) because Ivan Polakof was the owner of the Baldwin Park property, and the water stock had to run with the land and be issued in the name of the owner of the land. [R. 98.]

Marvin Polakof never paid any portion of the original purchase price of the Baldwin Park property in 1935 [R. 168, 182, 188], paid no part of the cost of the water stock that was appurtenant to the land [R. 99, 192], paid no part for the purchase of Mr. A. Fratkin's interest in the property in 1937, and paid no part of the trust deed held by Mr. Fratkin in 1939, given as part of the purchase price of Mr. A. Fratkin's interest in the property [R. 159-160], paid no taxes levied against the property [R. 191], and paid no monies for the repairs to the property [R. 192], and exercised no control over the property. [R. 169, 170, 188.]

Ivan Polakof paid the original purchase price of the Baldwin Park property in 1935 [R. 188], paid for the water stock that was appurtenant to the land [R. 99, 192], paid for the purchase of Mr. A. Fratkin's interest in the property in 1937, and paid the trust deed due to Mr. A. Fratkin in 1939, to-wit, the consideration for purchasing Mr. A. Fratkin's interest [R. 159, 160], paid all taxes levied against the property [R. 191], and paid the monies for the repairs to the property. [R. 192.]

Further, the facts disclose that at the time of the transfer of the record title of the Baldwin Park property to Marvin Polakof in 1935, Ivan Polakof told Marvin Pola-

kof that he should never hold himself out as the owner of the Baldwin Park property, never set forth the Baldwin Park property as his asset in any financial statement, and never secure credit on the basis of the ownership of said Baldwin Park property. [R. 209.]

The facts disclose that no financial statement was ever issued by Marvin Polakof claiming to be the owner of the Baldwin Park property. [R. 126, 130, 153, 154.] Marvin Polakof never told anyone he owned the Baldwin Park property [R. 130], and never exercised any control over the property. [R. 169, 170.]

The facts disclose that no creditor ever gave any credit to Marvin Polakof with the knowledge that Marvin Polakof owned the Baldwin Park property. In fact, not one of the creditors who testified knew that Marvin Polakof owned the property until after the bankruptcy of Marvin Polakof in 1940. There were four creditors of Marvin Polakof who testified in court that monies were due to them in April 24, 1939. Not one unsecured creditor claimed any monies were due on August 26, 1937, the date of the delivery of the deed. The May Co., whose claim was \$18.96, through Miss Kuhne Jantzen, testified that the monies became due by Marvin Polakof to them in May, 1937, based upon a conditional sales contract for a man's suit; there was no representation that Marvin Polakof owned the Baldwin Park property. [R. 42-43.] The Royal Credit Jewelers, whose claim was \$67.71, through Gary Freeman, testified that the monies became due by Marvin Polakof to them on April 24, 1939, based upon a

conditional sales contract for jewelry; there was no representation that Marvin Polakof owned the Baldwin Park property. [R. 48.] Elmer J. Walthers, an attorney, testified that Marvin Polakof owed him \$100.00 for professional services, due as of April 7, 1939. He could not testify whether the claim was for services rendered before August 26, 1937. He did not rely upon the ownership of the Baldwin Park property by Marvin Polakof. In fact, he did not rely upon anything in particular for the payment of the bill. [R. 37-38-39.] The largest creditor of Marvin Polakof was the Acampo Winery. Their representative, H. E. Graeber, testified that they had no financial statements in their files of any kind issued by Marvin Polakof prior to 1940 as the basis for extending credit to Marvin Polakof, doing business as the Ace distributing Co. [R. 101.] He testified that the Acampo Winery had sold about \$5,000.00 worth of merchandise each and every month since 1937 to the Ace Distributing Co., and was paid off within sixty days after the merchandise was delivered, the last delivery being made on June 30, 1940. [R. 16, 17, 25.] They had no knowledge that Marvin Polakof owned the Baldwin Park property until after the bankruptcy proceedings began in 1940. [R. 27-28.] That, except for a disputed bill of \$2000.00 for which trade acceptances were not given until two years after the delivery, all money due to Acampo Winery were incurred within ninety days prior to the bankruptcy in 1940, and subsequent to the transfer of title by Marvin Polakof to Ivan Polakof of the Baldwin

Park property. Further, that in 1940, an accounting was had between the Acampo Winery and Marvin Polakof, and the Acampo Winery accepted Marvin Polakof's notes endorsed by one, Percy Barker, and \$2000.00 in cash in settlement of their account, including the disputed bills referred to.

Summarized, the facts disclose that on or about August 26, 1937, Marvin Polakof was solvent and was paying his bills in the regular course of business. There were no suits or threatened suits by any of his creditors against Marvin Polakof. The creditors of Marvin Polakof had no knowledge that Marvin Polakof was the purported owner of the Baldwin Park property and extended no credit based upon his purported ownership of the Baldwin Park property. [R. 153.] That on or about April 24, 1939, Marvin Polakof was solvent, paying his bills in the regular course of business, there were no suits or threatened suits by any of his creditors for the payment of his bills, and the creditors of Marvin Polakof had no knowledge that Marvin Polakof had been the purported owner of the Baldwin Park property, and extended no credit based upon his purported ownership of the Baldwin Park property. Marvin Polakof had a good reputation of paying his business debts, a little slow, but he always paid these bills. [R. 153, 154.] That no suit was threatened against Marvin Polakof until August, 1940. [R. 155.]

Further, the bankruptcy did not take place until eighteen months after the recording of the deed from Marvin Polakof to Ivan Polakof, to-wit, August, 1940.

Statement of the Court at the Trial.

“I think there is plenty of law on your side, but I think the facts are very weak. The facts preponderantly show that this property belonged to Ivan from the inception of the transaction. There is no dispute about the fact that Ivan paid off this other co-owner, by a cashier’s check, I believe, of something over a thousand dollars. That is one of the strongest evidence of interest in property, to pay off the encumbrance that effects it. I further feel that there is no evidence here that these people did what is ordinarily done when there is a piece of property in one’s name, that is, to hold it out to his creditors. [R. 268.]

* * * The burden in the case of fraud is always on the plaintiff. This encumbrance took place in 1937. The evidence is that they were solvent at that time. The fact that they took the transfer in 1939 is a question of whether they were solvent or insolvent. The accountant figured out they were solvent by about \$37, but he stated that figure might vary as much as 500 one way or the other. It was an estimate. But the original transaction took place years before, and the recording of it. There was no pressing of creditors at the time this deed was recorded, and the bankruptcy did not take place until 18 months after. [R. 269.] * * * And if I were to hold in favor of the plaintiff in this case I would do exactly that, because it hasn’t any of the badges of fraud. There is no evidence that any creditor has been misled in any way, shape or form by the fact that this title was in the name of Marvin. The fact is that the evidence has not disclosed that any of them knew of it.” [R. 270.]

ARGUMENT.

I.

The Finding of the Court That the Baldwin Park Property Belonged Solely to Ivan Polakof and Not to Marvin Polakof Is in Accordance With the Weight of the Evidence.

This case arose in the State of California. All parties were citizens of the State of California, to-wit, the plaintiff, all the creditors, and all the defendants. The property was located within the boundaries of the State of California. Therefore, this case is governed by the laws of the State of California.

In the present case, the appellant failed to show any scheme or conspiracy by Ivan Polakof to defraud any of Marvin Polakof's creditors. Were there any of the usual badges of fraud and conspiracy? No! The evidence is clear and convincing that there was no scheme or conspiracy actual or inferable to defraud Marvin Polakof's creditors. Marvin Polakof paid no part of the consideration for the purchase of the property, paid no part of the taxes or upkeep, never held himself out as the owner of the property, never secured any credits on the understanding that he owned the property, never issued any statement that he owned the property. Further, no creditor claimed he gave credit on the basis of Marvin Polakof's owning the property. On the contrary, not a single creditor knew that Marvin Polakof was the purported owner of the property. Even the largest creditor, the Acampo Winery, which sold \$5000.00 a month merchandise to Marvin Polakof since 1935, and whose accounts had normally been paid within 60 days of the date of the delivery, never had a financial statement from Marvin Polakof claiming the ownership of the Baldwin Park

property. (For the sake of clarity, the real estate referred to in Plaintiff's Exhibits 8 and 9, dated October 20, 1940, and October 24, 1940, was the property on Kohler Street, where the Ace Distributing Co. was located, subject to an incumbrance of \$10,500.00? [R. 125.]) There never was an attempt by Marvin Polakof to secure monies or creditors on the basis of an alleged ownership of the Baldwin Park property, and no credit or monies were ever secured on that basis. So no creditor could have been thus defrauded.

While appellant has tried to point out conflicting evidence, which might cast some reflection on the statements and acts of the appellees, the appellant had the burden of proof to establish fraud by clear and convincing evidence. The appellant has failed to do so.

All the parties testified before the court, there was a complete cross-examination of all witnesses, all of the appellant's evidence was admitted. The trial court had the full and complete opportunity of seeing and hearing the witnesses.

The case merely presents a conflict in the evidence offered before the trial court, and the court resolved the conflict against the appellant.

There was substantial and ample evidence to support the court's findings. With the conclusions of the trial court as to the weight to be given to conflicting evidence, this court should not interfere.

“Where fraud is alleged, as by appellant here, he assumes the burden of establishing his charge, and the presumptions of honesty and fair dealing must be overcome by evidence of convincing force.”

Hedden v. Waldeck, 9 Cal. (2d) 631, 72 P. (2d)

“Conceding the utmost to appellant’s arguments and disregarding for the moment the inadequate state of the record herein, there is disclosed nothing more than a conflict in the evidence offered before the trial court, and the court resolved that conflict against appellant. With the conclusions of the trial court as to the weight to be given to conflicting evidence this court will not interfere.”

Fares v. Morrison, 4 Advance Cal. App. Dec. 1022, 1024 (decided October, 1942.)

The evidence clearly indicates that no creditor knew of the transaction, that no creditor gave credit and monies to Marvin Polakof on the basis of the purported ownership of the property by Marvin Polakof, that no creditors knew Marvin Polakof purportedly owned the property. Therefore, they could not have been defrauded. Marvin Polakof, both on August 26, 1937, the date he executed and delivered the deed to Ivan Polakof, as well as on April 24, 1939, the date Ivan Polakof recorded the deed, was solvent and paying his bills in the regular course of business. There were no suits or threatened suits for the payment of monies by any creditors of Marvin Polakof until 1940, nearly 18 months after the deed was recorded. The only credit extended to him prior to the delivery of the deed was based on conditional sales contracts. Not one of the creditors testified that the property sold under conditional sales contract was worth less than the obligations by Marvin Polakof. A secured creditor cannot be defrauded if the security is equal or exceeds the value of the obligation. Further, the secured creditors knew nothing of the purported ownership of the property by Marvin Polakof in 1937. The attorney, Elmer J. Walthers, testified that he gave credit of \$100.00 on just Marvin Pola-

kof alone, and did not rely on anything in particular for the payment of the bill. The obligation due to the largest creditor, the Acampo Winery, accrued within 90 days of the bankruptcy, to-wit, in the year 1940. The last delivery of merchandise was on June 30, 1940. Further, they accepted \$2000.00 cash and notes of Marvin Polakof endorsed by Percy Barker in the year 1940 for Marvin Polakof's obligation, if any, incurred prior to the year 1940. They gave \$5000.00 monthly credit to the business because of the payment of its obligation, and not on the basis of any financial statement. Further, Acampo Winery knew nothing of the ownership of the Baldwin Park property until after the bankruptcy in the fall of 1940. They gave no credits on the purported ownership of the Baldwin Park property by Marvin Polakof.

The appellant failed to produced evidence that any unpaid and unsecured creditors existed at the time of the transfer of the Baldwin Park property on August 26, 1937.

The appellant makes much of the failure of Ivan Polakof to record the deed. As testified by the appellant's witness Albright, and by Ivan Polakof, upon Mr. Albright's advice, Ivan Polakof waited until he was about ready to pay off Mr. A. Fratkin's trust deed and bring down the title, before Ivan Polakof recorded the deed. As soon as Mr. Fratkin was paid, the title was actually brought down by the Title Insurance and Trust Company on August 26, 1939, at the request of Ivan Polakof and showed the property to be owned by Ivan Polakof.

The most striking evidence of good faith and the most potent evidence of the lack of fraud or conspiracy to defraud is shown by the following summary of the facts:

1. Ivan Polakof paid the purchase price for his one-half interest in the property from his own funds.

2. Ivan Polakof had funds of his own, as he had earned \$10,000.00 in one year prior to 1935.

3. Marvin Polakof paid no part of the original purchase price.

4. Ivan Polakof, in 1939, from his own funds paid off the trust deed given to Mr. A. Fratkin to purchase his interest in the remaining one-half of the property.

5. Ivan Polakof explained by competent evidence the source of the funds in 1939, to-wit, the proceeds of the loan on his Riverside Drive properties.

6. Marvin Polakof paid no part of these monies used to pay off Mr. A. Fratkin in 1939.

7. Ivan Polakof paid for the water stock appurtenant to the land, in the year 1937, soon after the property was transferred to him by Marvin Polakof, and by Mr. A. Fratkin.

8. Marvin Polakof paid no part of the monies paid for the water stock.

9. Ivan Polakof paid the taxes and repairs of the property since 1935.

10. Marvin Polakof paid no part of the taxes and upkeep of the property since 1935.

The usual badges of fraud are entirely absent. Not one cent of Marvin Polakof's property or monies was used to purchase the real property, or the water stock, or for the taxes and upkeep. Marvin Polakof's creditors might have been entitled to recover any monies paid by Marvin Polakof for the purchase of the real property or water stock or taxes or upkeep. Certainly, in good conscience, they are not entitled to recover anything if none of Marvin Polakof's monies or assets were used to purchase the property or used to pay upkeep or taxes. Inasmuch as Marvin Polakof paid no monies, he certainly has no rights to be reimbursed. Accordingly, Marvin Polakof's creditors stand in his shoes and have no rights to be reimbursed or to have any rights in the Baldwin Park property.

If Ivan Polakof were interested in defrauding creditors, would he have paid the entire purchase price from his own funds, disclosed fully the source of his funds, paid with his own funds for the water stock and had it issued in his name in 1937, paid off the \$1000.00 due Mr. A. Fratkin in 1939 for Fratkin's half interest, paid with his own funds all the taxes and upkeep? The answer is no! Actions speak louder than words. Ivan Polakof acted as an owner in good faith, and without the slightest fraudulent intention.

II.

Where a Grantee Merely Holds Property as Trustee for the Grantor, Such Property Is Not Subject to the Debts of the Grantee, and May Not Be Reached by the Grantee's Creditors.

Goldberg Bowen & Co. v. Demick, 77 Cal. App. 535, 542; 247 P. 261:

“As defendant tacitly concedes, where one who holds property as trustee for another under a resulting trust conveys to that other the property so held, neither the creditors nor the trustee in bankruptcy of such grantor can attack the conveyance. (Citing *Nishi v. Downing* (1937), 21 Cal. App. (2d) 1, 3 (67 P. (2d) 1057); *Zeller v. Knapp* (1933), 135 Cal. App. 122, 123 (26 P. (2d) 704); *Bank of Cottonwood v. Henriques* (1928), 91 Cal. App. 88, 95 (266 Pac. 836); *Murphy v. Clayton* (1896), 113 Cal. 153, 159 (45 Pac. 267).)” * * *

“The trust here was properly proved by parol evidence. Even though it be regarded as an express trust, orally agreed upon, and in this respect running counter to the provisions of section 852 of the Civil Code requiring a writing for that purpose, plaintiff's husband, who might have objected to its validity on that ground, has instead, carried it out. The defendant is not, thereafter, in position to assert its invalidity on that ground. (Citing *Polk v. Boggs* (1898), 122 Cal. 114, 116 (54 Pac. 536); *Nishi v. Downing*, *supra* (1937), 21 Cal. App. (2d) 1, 3.)

Owings v. Laugharn, 53 Adv. Cal. App. Dec. 1004, 1006-1009, decided August 5, 1942. A petition for hearing in the Supreme Court of California was denied in September, 1942.

“Though several points are advanced in the briefs, the controlling question is whether the creditors may take property standing in the name of the judgment debtor which he holds merely as trustee for another. That such property cannot be subjected to the payment of the debts of the trustee is settled by unquestioned authority.”

To the same effect:

Nishi v. Downing, 21 Cal. App. (2d) 13, decided in 1937.

Zeller v. Nett, 135 Cal. App. 122, 127, 128.

“It is well settled that the party setting up the trust must show the money was paid by him at or before the execution of the conveyance. (Citing Sec. 853, Civ. Code; *Murphy v. Clayton*, 113 Cal. 153 (45 Pac. 267); *Case v. Coddington*, 38 Cal. 193; *Breeze v. Brooks*, 71 Cal. 169 (9 Pac. 670, 11 Pac. 885); *South San Bernardino Land & Investment Co. v. San Bernardino National Bank*, 127 Cal. 245 (59 Pac. 699); *Polk v. Boggs*, 122 Cal. 114 (54 Pac. 536); *Moultric v. Wright*, 154 Cal. 520 (98 Pac. 257); *Lincoln v. Chamberlain*, 61 Cal. App. 399 (214 Pac. 1013); *Pomeroy's Equity Jurisprudence*, Sec. 1033; *Brown v. Spencer*, 163 Cal. 589 (126 Pac. 493); *Webb v. Vercoe*, 201 Cal. 754 (54 A. L. R. 1200, 258 Pac. 1099).) It follows, therefore, that William R. Henriques was not the owner of the property in question, but was only the trustee for Frank R. Henriques, the real owner, and that William R.

Henriques had no interest in the lands in question, to which the lien of appellant's judgment could attach.

"The law is also well settled that a bankrupt may continue to discharge his duties as a trustee, and trust property in his possession does not go to his assignee or to his creditors. (Hayford v. Wallace, 5 Cal. Unrep. 476 (46 Pac. 293); Perry on Trusts, Sec. 346.)

"Therefore, William R. Henriques, having no interest in the lands to which appellant's judgment could attach, it is wholly immaterial whether he was solvent or insolvent, or contemplated insolvency when he made the deed of the trust property to his sister, Marie E. Henriques.

"It is next contended by appellant that the intervener Frank R. Henriques is estopped from asserting title to the property in question for the reason that he voluntarily placed the title of record in the name of William R. Henriques. There is no merit in this contention. The intervener did absolutely nothing other than to permit his property to stand of record in the name of William R. Henriques." * * *
"Indeed, the court found upon sufficient evidence that the bank loaned the \$3,500 solely and alone upon the security of the chattel mortgage upon the cattle.

"It was necessary for the appellant, in order for it to prevail in this action, to show that Frank R. Henriques was in some way privy to William R. Henriques' obtaining credit from the bank, or that in gaining such credit, the bank relied upon some affirmative statement or act of Frank R. Henriques, other than his permitting the title to stand of record in the name of William R. Henriques, and the mere fact that Frank R. Henriques allowed the title to the land to stand of record in the name of William R.

Henriques is unavailing to appellant, unless it established to the satisfaction of the court that they relied thereon as an inducement to give credit to William R. Henriques (*Breeze v. Brooks*, 97 Cal. 75 (22 L. R. A. 257, 31 Pac. 742); *Murphy v. Clayton*, *supra*), but, as we have seen, the findings of the trial court negative any such contention.

“It does not appear that the deed from William R. Henriques to Marie E. Henriques was made to hinder, delay or defraud the bank; on the contrary, it was made simply to transfer the bare legal title to the land from William R. Henriques to Marie E. Henriques.”

Bank of Cottonwood v. Henriques, 91 Cal. App. 88, 95-96.

The present case, in accordance with the hereinbefore stated facts as found by the court to be true, is on all fours with the cases cited under this subdivision. Ivan Polakof paid for the purchase of his one-half interest in the Baldwin Park property and paid thereafter for the purchase of Mr. A. Fratkin's one-half interest in the Baldwin Park property. The title was placed in Marvin Polakof's name merely as a naked trustee for the purpose of holding title. Ivan Polakof paid all the money expended for the water stock, for the upkeep and taxes. None of Marvin Polakof's creditors gave any credit to Marvin Polakof, or advanced monies or sold him merchandise on the basis of Marvin Polakof's purported ownership of the Baldwin Park property. In fact, no creditor knew of the purported ownership of Marvin Polakof of the Baldwin Park property until after the bankruptcy of Marvin Polakof. The cases cited under this subdivision should control this case.

Conclusion.

Ivan Polakof earnestly believes that the evidence unequivocally shows that Ivan Polakof acted in a *bona fide* manner in all of his transactions; that he did not defraud or intend to defraud any creditors of Marvin Polakof; that none of the creditors were defrauded, expressly or impliedly, and that not one cent of Marvin Polakof's monies were used to purchase the Baldwin Park property in 1935 or 1939, or to pay for the upkeep or taxes or for the purchase of the water stock.

The appellees, therefore, respectfully ask that the judgment appealed be affirmed.

Respectfully submitted,

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